

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 245

THE UNITED STATES, PETITIONER

VS.

THE ALGOMA LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 2, 1938

CERTIORARI GRANTED OCTOBER 10, 1938

SUPREME COURT OF THE UNITED STATES

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In the Court of Claims

No. M-109

ALGOMA LUMBER COMPANY, A CORPORATION, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed April 1, 1931

To the Honorable Chief Justice and the Judges of the Court of Claims:

The plaintiff Algoma Lumber Company; respectfully represents:

1. That the plaintiff is, and at the times hereafter referred to was, a corporation organized and existing under the laws of the State of California with its principal office and place of business in Los Angeles, California.

2. That on July 28, 1917, defendant, acting through the superintendent of the Klamath Indian School, under authority of the Act of Congress of June 25, 1910 (36 Stat. L. 855-857), entered into a contract with the plaintiff for the sale to the plaintiff of all of the merchantable dead timber, standing or fallen, and all of the live timber marked, or otherwise designated for cutting by the proper officer of the Indian Service upon an area of approximately 15,700 acres, being a part of the Indian Reservation near Klamath Falls, Oregon, the boundaries of which are described as follows:

"Beginning at the $\frac{1}{4}$ corner of Section 35, Township 32 South and Section 2, Township 33 South, Range 7 East, thence South one-half mile; thence West one mile; thence South one-half mile; thence West one mile; thence South one-half mile; thence West $1\frac{3}{4}$ miles to reservation line in Section 18, Township 33 South, Range 7 East; thence North along reservation line for approximately ten miles to Sand Creek; thence in an Easterly direction along the border of the Lodge pole pine on the South side of Sand Creek to a point near the corner of Sections 26, 27, 34, and 35, Township 31 South, Range 7 East, thence in a Southerly and Southeasterly direction along the edge of the Lodge pole pine to the Southeast corner of Section 35, Township 32 South, Range 7 East, thence West one-half mile to the place of the beginning;"

a copy of said contract marked Exhibit A being hereto attached and made a part hereof.

3. That the provisions of said contract with respect of the price to be paid to the superintendent of the Klamath Indian

School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians for timber cut and removed under said contract are as follows:

"For and in consideration of the foregoing, the Algoma Lumber Company, party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure Scribner Decimal C Scale, which rates for specified periods of the contract shall be as follows:

"For the period ending March 31, 1920, Three Dollars and Fifty-seven Cents per thousand feet board measure for yellow pine (including so-called bull pine) and sugar pine and Fifty Cents per thousand feet board measure for white fir.

"For the three-year periods of the contract term, beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

"This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twenty million feet will be paid for, cut and removed prior to April 1, 1919, and not less than twenty million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of the unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

"The timber will be paid for in advance payments of not less than \$10,000.00 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than \$2,500.00. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School."

4. That the cash deposits required by said contract have been made from time to time.

5. That said contract provides a method for an adjustment by the Commissioner of Indian Affairs for the three-year periods beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, the provisions of the contract in this respect being as follows:

"It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three-year periods after April 1, 1920, shall be deter-

5. mined after a careful consideration of the cost of logging operations and of lumber manufacture in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon request presented at least thirty days before the date upon which the new stumpage rates are to become effective for any period. The new schedules shall be determined and notice thereof given the purchaser on or before February 1, 1920, February 1, 1923, February 1, 1926, February 1, 1929.

"It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed.

"As a basis for comparison in a readjustment of the prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and Northern California at the beginning of the three-year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five Cents (\$15.75) for yellow pine (including bull pine and sugar pine), and Thirteen Dollars and Fifty Cents (\$13.50) for white fir."

6. That under the last above quoted provision of said contract the Commissioner of Indian Affairs gave notice and did fix the price of yellow pine and sugar pine timber at \$4.24 per thousand feet, which price became effective April 1, 1920, and correspondingly did give notice and did fix the price of yellow pine and sugar pine timber under said contract at \$4.90 per thousand feet, which price became effective April 1, 1923, and correspondingly did, prior to April 1, 1926, notify the plaintiff that no increase in the price of said yellow pine or sugar pine timber would be made by said Commissioner as of April 1, 1926, and that by reason of such fixing of the price for said timber as of date April 1, 1926, under and in accordance with the terms of the contract, said price remained established and could not be changed by the Commissioner of Indian Affairs until and upon due notice, and not before April 1, 1929.

7. That during the three years directly preceding January 1, 1928, there was no increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California, neither was there any such increase during the three years directly preceding January 1, 1929, nor was there any such increase during the three years directly preceding January 1, 1930.

8. That the Commissioner of Indian Affairs was without authority or warrant under the terms and provisions of said contract

to make any increase in the price of yellow pine or sugar pine timber for the year commencing April 1, 1928; but, nevertheless, prior to said date said Commissioner gave notice that he would make, and subsequently attempted to make effective, an increase in the price of yellow pine and sugar pine timber under said contract for the year commencing April 1, 1928, of \$.40 per thousand feet, making said price \$5.30 per thousand feet.

9. That plaintiff protested against said increase and against the appropriation of any of the moneys then or thereafter deposited by it under said contract for the payment of yellow pine and/or sugar pine at any price in excess of \$4.90 per thousand feet, but defendant refused to heed such protest and appropriated moneys, deposited by the plaintiff, at the rate of \$5.30 per thousand feet; that during said year the plaintiff cut under said contract 25,677,248 feet of yellow pine and sugar pine timber, for each thousand feet of which, over the protest of plaintiff, defendant appropriated of plaintiff's money on deposit with it the sum of \$.40 per thousand feet in excess of the amount which could rightfully have been appropriated, or a total of Ten Thousand, Two Hundred Seventy and 90/100th Dollars (\$10,270.90).

10. That the Commissioner of Indian Affairs was without authority or warrant under the terms and provisions of said contract to make any increase in the price of yellow pine or sugar pine timber for the year commencing April 1, 1929; but, nevertheless, prior to said date said Commissioner gave notice that he would make, and subsequently attempted to make effective, an increase in the price of yellow pine and sugar pine timber under said contract for the year commencing April 1, 1929, of \$.40 per thousand feet, making said price \$5.30 per thousand feet.

11. That plaintiff protested against said increase and against the appropriation of any of the moneys then or thereafter deposited by it under said contract for the payment of yellow pine and/or sugar pine timber at any price in excess of \$4.90 per thousand feet but defendant refused to heed such protest and appropriated moneys deposited by the plaintiff at the rate of \$5.30 per thousand feet; that during said year beginning April 1, 1929, plaintiff cut under said contract 31,975,280 feet of yellow pine and sugar pine timber for each thousand feet of which, over the protest of plaintiff, defendant appropriated of plaintiff's moneys on deposit with it the sum of \$.40 per thousand feet in excess of the amount which could rightfully have been appropriated, or a total of Twelve Thousand, Seven Hundred, Ninety and 11/100ths Dollars (\$12,790.11).

12. That the Commissioner of Indian Affairs was without authority or warrant under the terms and provisions of said contract to make any increase in the price of yellow pine or sugar pine timber for the year commencing April 1, 1930; but, nevertheless, prior to said date said Commissioner gave notice that he would make, and

9 subsequently attempted to make effective an increase in the price of yellow pine and sugar pine timber under said contract for the year commencing April 1, 1930, of \$40 per thousand feet, making said price \$5.30 per thousand feet.

13. That plaintiff protested against said increase and against the appropriation of any of the moneys then or thereafter deposited by it under said contract for the payment of yellow pine and/or sugar pine timber at any price in excess of \$4.90 per thousand feet but defendant refused to heed such protest and appropriated moneys, deposited by the plaintiff, at the rate of \$5.30 per thousand feet; that during said year the plaintiff cut under said contract 5,083,870 feet of yellow pine and/or sugar pine timber, for each thousand feet of which, over the protest of plaintiff, defendant appropriated of plaintiff's moneys on deposit with it the sum of \$40 per thousand feet in excess of the amount which could rightfully have been appropriated, or a total of Two Thousand, Thirty-three and 55/100ths (\$2,035.55) Dollars.

14. That although restitution thereof has been demanded by plaintiff, defendant has refused, and still refuses, to return to plaintiff the said sums so unlawfully collected from it, which amount in the aggregate to Twenty-five Thousand, Ninety-four and 56/100ths (\$25,094.56) Dollars.

15. That plaintiff is a citizen of the United States and has at all times borne true allegiance to the Government thereof and has not in any way aided, abetted, or given encouragement to any of the enemies of the said Government, and that the facts as stated in this petition are true.

16. That no other action as aforesaid has been had on this claim in Congress or any other department of the Government; that plaintiff is the sole owner of this claim, and the only person interested therein; that no assignment or transfer thereof, or any part thereof, or of any interest therein, has been made, and that plaintiff is fully entitled to the amount herein claimed from the United States after the allowance of all just credits and off-sets.

WHEREFORE, plaintiff prays judgment for said sum of Twenty-five Thousand, Ninety-four and 56/100ths (\$25,094.56) Dollars, and such other and further relief as to the court plaintiff may appear to be entitled.

[SEAL]

ALGOMA LUMBER COMPANY,
By E. J. GRANT, *President*.
CARL D. MATZ,

Attorney for Plaintiff.

[Duly sworn to by E. J. Grant; jurat omitted in printing.]

11 Subscribed and sworn to before me this 27th day of March,
1931.

HAROLD S. MORRISON,
Notary Public.

My commission expires October 21, 1931.

Exhibit A to petition

TIMBER CONTRACT, MIDDLE MT. SCOTT UNIT, KLAMATH INDIAN RESERVATION

This agreement, made and entered into at the Klamath Indian School, State of Oregon, this 28th day of July, 1917, under authority of the Act of Congress of June 25, 1910 (36 Stat. L. 855-857), and the Regulations and instructions for Officers in charge of forests on Indian reservations, approved June 29th, 1911, as amended March 17th, 1917, between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part, and The Algoma Lumber Company of Algoma, State of Oregon, party of the second part.

Witnesseth: That the party of the first part agrees to sell to the said Algoma Lumber Company, party of the second part, upon the terms and conditions herein stated, all the merchantable dead timber, standing or fallen, and all the live timber, marked or otherwise designated for cutting by the proper officer of the Indian Service, estimated to be approximately two hundred fifty million feet board measure, log scale, of pine timber (approximately ninety-five per cent yellow pine and five per cent sugar pine), and about ten million
12 feet of white fir, located upon the designated area of approximately 15,700 acres as hereinafter described.

For and in consideration of the foregoing, the Algoma Lumber Company, party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure, Scribner Decimal C Scale, which rates for specified periods of the contract shall be as follows:

For the period ending March 31, 1920, Three Dollars and fifty-seven cents per thousand feet board measure for yellow pine (including so called bull pine) and sugar pine and Fifty cents per thousand feet board measure for white fir.

For the three year periods of the contract term, beginning April 1, 1920, April 1, 1923, April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three year periods after April 1, 1920, shall be determined after a careful consideration of the cost of logging operations and of lum-

ber manufacture in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon request presented at least thirty days before the date upon which the new stumpage rates are to become effective for any period. The new schedules shall be determined and notice thereof given the purchaser on or before February 1, 1920, February 1, 1923, February 1, 1926, February 1, 1929.

It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed.

As a basis for comparison in a readjustment of the prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and Northern California at the beginning of the three year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five cents (\$15.75) for yellow pine (including bull pine and sugar pine) and Thirteen Dollars and Fifty cents (\$13.50) for white fir.

It is agreed by the party of the first part that the cutting of white fir shall be optional with the purchaser, except that trees of these species, containing fifty per cent merchantable timber which are seriously injured in the logging operations shall be taken or paid for.

And Algoma Lumber Company, party of the second part, further agrees to cut and remove the said timber in strict accordance with the following conditions and all Regulations governing timber sales prescribed by the Secretary of the Interior:

1. The term "Officer in Charge," whenever used in these Regulations, signifies the Officer designated by the Commissioner of Indian Affairs to supervise timber operations on the Klamath Indian Reservation.

2. The sale includes an area of approximately 15,700 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown on the attached map, which is made a part of this contract, and are further described as follows:

"Beginning at the $\frac{1}{4}$ corner of Section 35, Township 32 South, and Section 2, Township 33 South, Range 7 East; thence South $\frac{1}{2}$ mile; thence West one mile; thence South $\frac{1}{2}$ mile; thence West one mile; thence South $\frac{1}{2}$ mile; thence West $\frac{1}{2}$ mile; thence South one mile; thence West $1\frac{3}{4}$ miles to reservation line in Section 18, Township 33 South, Range 7 East; thence North along reservation line for approximately ten miles to Sand Creek; thence in an easterly

direction along the border of the lodge pole pine on the south side of Sand Creek to a point near the corner of Sections 26, 27, 34, and 35, Township 31 South, Range 7 East, thence in a southerly and southeasterly direction along the edge of the lodge pole pine to the southeast corner of Section 35, Township 32 South, Range 7 East, thence West $\frac{1}{2}$ mile to the place of beginning."

The sale area includes 14 allotments, comprising approximately 2,240 acres, as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell and to pay to such Indians ten per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it

being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area, at the prices fixed for unallotted land.

3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twenty million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twenty million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of the unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

4. The timber will be paid for in advance payments of not less than \$10,000 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than \$2,500. The amount deposited with the accepted bid will be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

5 to 25. omitted.

Omitted portions of contract have to do entirely with method of selection, cutting, scaling, and transportation of timber; piling and burning of brush; general fire prevention; location of logging roads, camps, and mills, and similar detail.

26. Refunds of deposits under the contract shall be made only at the discretion of the Commissioner of Indian Affairs.

16 27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

28. All books pertaining to the logging operations and the milling business of the purchaser, will be open to inspection with the understanding and agreement that any information obtained through such inspection shall be considered confidential and, without the consent

of the purchaser, shall not be disclosed to anyone except those connected with the government service.

29. No member of or delegate to Congress shall be admitted to any share, part, or interest in any contract, or to any benefit derived therefrom (See Sections 114 and 116, Act of March 4th, 1909, entitled "An Act to Codify, Revise, and Amend the Penal Laws of the United States," 33 Stat. 1088, 1109), and no person undergoing a sentence of imprisonment at hard labor shall be employed in carrying out any contract (See Executive Order of May 18, 1905). The cutting or removal of timber from Indian Lands in breach of the terms of any contract, and without other lawful authority, or the leaving of fires unextinguished, will render the contractor liable to the penalties prescribed by Section 6 of the Act of June 25th, 1910 (36 Stat. L. 855, 857).

30. As a further guarantee of a faithful performance of this contract, the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of forty thousand dollars (\$40,000), and further agrees that upon the failure on his part to fulfill any and all of the conditions and requirements hereinbefore set forth all moneys paid under this agreement shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder.

ALGOMA LUMBER COMPANY,

F. P. FAY, *Vice-Pres.*

(*Signature of Purchaser.*)

ALGOMA LUMBER COMPANY,

E. J. GRANT,

(*Signature of Purchaser.*)

J. M. JOHNSON,

(*Superintendent, Klamath Indian School.*)

Witnesses:

H. E. CHURCHILL.

Geo. V. HERR.

Approved:

C. E. BRESSETTE,

C. A. WALKER,

Sept. 14, 1917.

S. G. HOPILUIS,

Assistant Secretary.

18 II. History of proceedings

On May 11, 1931, the defendant filed a general traverse to plaintiff's petition.

On April 25, 1934, the defendant filed a motion for leave to withdraw the general traverse and file a plea to the jurisdiction in lieu thereof.

Said motion was allowed by the court June 12, 1934, and, on the same day, the defendant filed a plea to the jurisdiction.

On November 5, 1934, the plea to the jurisdiction was argued and submitted.

On December 3, 1934, the court entered the following order on said plea:

ORDER

This case comes before the court on the defendant's plea to the jurisdiction of the court. Upon consideration thereof it is ordered this 3d day of December, 1934, that said plea be and the same is overruled without prejudice.

After the overruling of the defendant's plea to the jurisdiction no other answer by the defendant was filed.

III. *Argument and submission of case*

On October 8, 1937, this case was argued and submitted on merits by Mr. Carl D. Matz and Mr. William S. Bennet, for plaintiff, and by Mr. James J. Sweeney, for defendant.

19. IV. *Special findings of fact, conclusion of law and opinion of the court, by Williams, J.*

Filed Jan. 12, 1938

Messrs. Carl D. Matz and William S. Bennet for the plaintiff. Mr. Jesse Andrews was on the briefs.

Mr. James J. Sweeney, with whom was Mr. Assistant Attorney General Sam E. Whitaker, for the defendant.

The court, upon the report of a commissioner and the evidence, makes the following:

Special findings of fact

1. Plaintiff is now, and at all times hereinafter mentioned has been, a corporation organized under the laws of the State of California, with its principal place of business in Los Angeles, California.

2. On March 21, 1917, the Assistant Secretary of the Interior approved a form of contract and regulations, and also a form of advertisement, for the sale of about 250,000,000 feet of pine (about 90% yellow pine and 10% sugar pine) and 10,000,000 feet of white fir, upon approximately 15,700 acres, within Townships 31, 32, and 33 South, Range 7 East, on what is known as Middle Mount Scott Unit, Klamath Indian Reservation, Klamath, Oregon. The form of contract, as approved, provided that it would extend for a period of 15 years from April 1, 1917.

The advertisement required that sealed bids be addressed to the Superintendent of the Klamath Indian School, Klamath,

Agency, Oregon. Bids were received until 12 o'clock noon, on May 31, 1917. Each bidder was required to state in his bid, for each species, the amount per thousand feet, Scribner decimal C. log scale, to be paid for all timber cut prior to April 1, 1920. The advertisement prescribed that prices subsequent to that date were to be fixed by the Commissioner of Indian Affairs, by three-year periods. Prospective bidders were informed that no bid less than \$3.25 per M feet for yellow and sugar pine, or 50¢ for white fir, for the first period, would be considered. Bids were required to be submitted in triplicate, and accompanied by a certified check on a solvent national bank, in favor of the Superintendent of the Klamath Indian School, in the amount of \$5,000.

3. On May 28, 1917, plaintiff, in response to the published invitation for bids, made its proposal, addressed to the Superintendent of the Klamath Indian School, Klamath Agency, Oregon, for the purchase of yellow and sugar pine at \$3.57, and white fir at 50¢. A certified check in the sum of \$5,000, drawn on the First National Bank of Los Angeles, California, payable to the Superintendent of the Klamath Indian School, accompanied the proposal.

In said proposal plaintiff stated:

"If our bid is accepted and we shall fail to fulfill our agreement in accordance with the regulations governing the sale, the amount of this check shall be forfeited to the use and benefit of the Klamath Indians."

4. Plaintiff's bid was the lower of the two bids received, and on June 4, 1917, the Special Agent in Charge of the Klamath Indian School forwarded to the Commissioner of Indian Affairs an abstract of the bids received, and recommended that plaintiff's bid be accepted. On June 25, 1917, the Assistant Secretary of the Interior approved the recommendation made by the Commissioner of Indian Affairs on June 16, 1917, that the bid of the Algoma Lumber Company be accepted, and on the same day advised the Special Agent in Charge of the Klamath Indian School, of the acceptance of plaintiff's bid, and directed him to prepare the contract and bond, and submit it to the Department. On June 25, 1917, plaintiff was advised of the acceptance of its bid, and that the Special Agent in Charge of the Klamath Indian School had been directed to prepare the contract and bond.

5. The contract was entered into July 28, 1917, and approved by the Assistant Secretary of the Interior on September 14, 1917.

The contract designated the parties thereto and the subject matter thereof as follows:

"TIMBER CONTRACT, MIDDLE MT. SCOTT UNIT, KLAMATH INDIAN
RESERVATION

"This agreement made and entered into at the Klamath Indian School, State of Oregon, this 28th day of July 1917, under authority of the Act of Congress of June 25, 1910 (26 Stat. L. 855-857), and

the Regulations and instructions for Officers in charge of forests on Indian reservations, approved June 29th, 1911, as amended March 17th, 1917, between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part, and The Algoma Lumber Company of Algoma, State of Oregon, party of the second part.

"Witnesseth: That the party of the first part, agrees to sell to the said Algoma Lumber Company, party of the second part, upon the terms and conditions herein stated, all the merchantable dead timber, standing or fallen, and all the live timber marked, or otherwise designated for cutting by the proper officer of the Indian Service, estimated to be approximately two hundred fifty million feet board measure log scale of pine timber (approximately ninety-five per cent yellow pine and five per cent sugar pine) and about ten million feet of white fir, located upon the designated area of approximately 15,700 acres as hereinafter described.

"For and in consideration of the foregoing, the Algoma Lumber Company, party of the second part, agrees to pay to the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians, the full value of the said timber, as shall be determined by the actual scale of the timber as it shall be cut, at fixed rates per thousand feet board measure Scribner Decimal C Scale, which rates for specified periods of the contract shall be as follows:

22 "For the period ending March 31, 1920, Three Dollars and fifty-seven cents per thousand feet board measure for yellow pine (including so called bull pine) and sugar pine and Fifty cents per thousand feet board measure for white fir."

"For the three year periods of the contract term, beginning April 1, 1920, April 1, 1923 April 1, 1926, and April 1, 1929, such prices per thousand feet board measure for each species as shall be fixed by the Commissioner of Indian Affairs in the manner hereinafter described.

"It is agreed between the parties to this contract that the rates to be designated by the Commissioner of Indian Affairs for each of the said three year periods after April 1, 1920, shall be determined after a careful consideration of the cost of logging operations and of lumber manufacture in comparison with the prevailing market prices for timber products in the Southern Oregon and Northern California region during the three years preceding January 1 of each year in which each new schedule of prices is fixed. Although the determination of the new rates shall lie wholly within the discretion of the Commissioner of Indian Affairs, a hearing will be afforded the purchaser upon request presented at least thirty days before the date upon which the new stumpage rates are to become effective for any period. The new schedules shall be determined and notice thereof given the purchaser on or before February 1, 1920; February 1, 1923; February 1, 1926; February 1, 1929.

"It is agreed further that the advance in stumpage rates as determined at the close of each specified period shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed.

"As a basis of comparison in a readjustment of prices as above specified, it is stipulated by the parties hereto that the average mill run wholesale net values per thousand feet f. o. b. at mills in Southern Oregon and Northern California at the beginning of the three year period which is to end on January 1, 1920, are Fifteen Dollars and Seventy-five cents (\$15.75) for yellow pine (including bull pine and sugar pine), and Thirteen Dollars and Fifty cents (\$13.50) for white fir.

* * * * *

The contract also contained the following provisions:

93 "2. The sale includes an area of approximately 15,700 acres to be designated on the ground before cutting begins. The boundaries of the unit are definitely shown on the attached map, which is made a part of this contract, and are further described as follows:

* * * * *

"The sale area includes 14 allotments, comprising approximately 2,240 acres, as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell, and to pay to such Indians ten per cent of the estimated value of the timber on each allotment within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area at the prices fixed for unallotted land.

"3. This contract will extend for a period of fifteen years from April 1, 1917, or until April 1, 1932. The actual cutting of timber, other than for construction purposes, will begin on or before July 1, 1918. Not less than twenty million feet will be paid for, cut, and removed prior to April 1, 1919, and not less than twenty million feet will be paid for, cut, and removed during each twelve months succeeding April 1, 1919, unless the Commissioner of Indian Affairs shall relieve the purchaser from cutting this minimum amount during any specified period because of unusual conditions involving serious hardship in a compliance with such requirement. All timber covered by this contract will be paid for, cut, and removed prior to April 1, 1932.

"4. The timber will be paid for in advance payments of not less than \$10,000 each when called for by the officer in charge, except that the last payment in any logging season may be in a sum not less than \$2,500. The amount deposited with the accepted bid will

be credited against the first payment. Payments for the timber shall be made to the Superintendent of the Klamath Indian School.

* * * * *

"23. The purchaser will pay for damage to property of the Indians growing out of his operations under the sale. The purchaser shall comply with all Regulations relative to the maintenance of order on Indian reservations. Indian labor shall be employed in the cutting and removal of the timber and in the disposal of the brush whenever the use of such labor is practicable.

"24. The title to the timber covered by the contract shall not pass to the purchaser until it has been paid for and scaled, measured, or counted.

24 "25. All questions relative to the location of railroad spurs, the exact areas to be logged, the location of all structures, and the requirements to be observed in their construction and other matters concerned with the operations of the purchaser upon the sale area shall be settled by the officer in charge. Final decisions as to points involved in the interpretation of the Regulations and provisions of the contract governing the sale, cutting, and removal of the timber shall be rendered by the Secretary of the Interior. Work may be suspended by the officer in charge if the terms of the contract are disregarded, and the violation of any one of such terms, if persisted in, shall be sufficient cause for the revocation of the contract and the cancellation of other permits and privileges.

"26. Refunds of deposits under the contract shall be made only at the discretion of the Commissioner of Indian Affairs.

"27. This contract shall be void and of no effect until approved by the Secretary of the Interior, and no assignment of the same in whole or in part shall be valid without the written consent of the Secretary of the Interior.

"28. All books pertaining to the logging operations and the milling business of the purchaser will be open to inspection at any time by an officer authorized by the Commissioner of Indian Affairs to make such inspection, with the understanding and agreement that any information obtained through such inspection shall be considered confidential, and, without the consent of the purchaser, shall not be disclosed to anyone except those connected with the Government service.

* * * * *

"30. As a further guarantee of a faithful performance of this contract, the said party of the second part agrees to furnish within 30 days from the execution of this contract a bond in the penal sum of forty thousand dollars (\$40,000), and further agrees that upon the failure on his part to fulfill any and all of the conditions and requirements hereinbefore set forth all moneys paid under this agreement shall be retained by the United States to be applied as far as may be to the satisfaction of their obligations assumed hereunder."

6. A penal bond in the sum of \$40,000, executed by individual sureties, was furnished by plaintiff on December 21, 1917, to guarantee the performance of the contract. By the terms of said bond the individual sureties obligated themselves to pay to the United States the penal sum therein named, on condition that the obligation of the bond would be inoperative in the event that plaintiff faithfully observed all the laws and regulations made for the governing of trade and intercourse with the Indians, and complied with the regulations and terms of the contract.

7. The regulations, approved June 29, 1911, as amended March 17, 1917, prescribed in detail the procedure to be followed in the administration of the sale of timber on Indian reservations. The declared purpose of the regulations was to so manage "the Indian forests as to obtain the greatest revenue for the Indians consistent with the proper protection and improvement of the forests."

Section 17 of the regulations prescribed that sales, involving a stumpage value of not exceeding \$50,000, might be made from unallotted land, by the Commissioner of Indian Affairs, or from allotments, with his approval. Sales involving a stumpage value exceeding \$50,000, should be made only with the express approval of the Secretary of the Interior.

Paragraph 23 of the amended regulations, approved March 17, 1917, provided in substance for the deduction of 8% of the gross proceeds derived from the sale of timber. This sum of 8% was deducted for the purpose of defraying the administrative expenses incidental to the sale of timber and was considered in the Superintendent's cash account as "Individual Indian Money Timber Expense." The remaining 92% was paid to the allottee, or his heirs, or deposited to the credit of the parties entitled thereto, as required by said regulations.

8. The first adjustment period under the contract commenced on April 1, 1920.

The contract required that notice of the new schedules be determined and given to the purchaser on or before February 1, 1920. In order for the Commissioner to determine the new schedule and give the notice required on February 1 of each year of the price adjustment period specified in the contract, it was necessary for plaintiff, and other timber operators, whose contracts were subject to the same price adjustment schedule, to furnish the Commissioner with data respecting cost of production and selling prices for the three years preceding January 1 of each year in which such new schedule of prices was fixed. Plaintiff experienced some delay in furnishing the required cost and sales price data, and as early as January 23, 1920, advised the Commissioner that it had intended asking for a revision downward, on account of the grades running lower than he had originally estimated and represented.

On March 29, 1920, the Commissioner wired plaintiff as follows:

"Reconsideration of all data submitted by you and others confirms

view expressed in office wire of February nineteenth that advance of sixty-seven cents per thousand feet on Mount Scott Unit is justifiable, effective April one, nineteen twenty. Should investigation at close of nineteen twenty convince me that this price is too high, reduction may be made for nineteen twenty-one and nineteen twenty-two."

On March 30, 1920, plaintiff replied, by letter, to the Commissioner's wire, advising him that it was prepared to accept the advance of 67c; that its greatest objection was not that the increase did not seem to be justified by present conditions, but that the United States Forest Service had made no increase on March 1, 1920, on a timber unit very close to the one operated by plaintiff, that contractor being its largest competitor in the District. The second paragraph of said letter stated:

"We note that you are prepared to make a reduction for 1921-1922 should an investigation at the close of 1920 convince you that the price is too high, and we wish to thank you for this promise of additional concession should conditions warrant."

On April 5, 1920, the Commissioner addressed a letter to the Superintendent of the Klamath Indian School, advising of the 67c increase on the Middle and Southern Mount Scott Units, effective April 1, 1920, and stating that the decision had been reached after a full consideration of all information presented by the Algoma and Lamm

Lumber Companies, and by the Superintendent and Forestry employees specifically detailed to gather information respecting the cost of production and selling prices during the years 1916 and 1919, inclusive; that while the data indicated that there had been a very marked increase in selling prices during the years 1917, 1918, and 1919 over the average price prevailing in 1916, it also showed a very large increase in the cost of production, and that the 67c increase, effective April 1, 1920, was based upon calculations that gave the companies credit for the full amount of the advance in production costs during 1917, 1918, and 1919, over the average production cost for 1916. The Superintendent was requested to have made, by timber men specially detailed for that purpose, a thorough study of production costs and lumber prices in the Klamath Region during the year 1920, for the purpose of determining whether the increase in the stumpage prices should be applicable during the years 1920 and 1921.

9. The second price adjustment period under the contract commenced on April 1, 1923.

On December 22, 1922, Mr. Lee Muck, Supervisor of Forests, was directed to proceed to the Klamath Indian Reservation, early in January, for the purpose of making a thorough study of the situation and recommending what increases, if any, should be made in the stumpage prices during the three years following April 1, 1923, in the Middle Mount Scott Unit, under the terms of the contract, to properly protect the interests of the Indians.

On January 3, 1923, the Commissioner advised plaintiff by letter that Mr. Muck had been assigned to make a special study of lumber costs and prices in the Klamath District. Plaintiff was asked to cooperate with the Department's representative, in order that the Commissioner might be in a position to determine, with fairness to all parties, what advances in stumpage prices, if any, should be made on April 1, 1923. Plaintiff was asked to notify the Commissioner not later than January 15, 1923, whether it would waive its right under the contract to receive notice of the proposed readjustment of prices prior to February 2, 1923, and allow until March 1, 1923, for such notice. The request for additional time was made because of the apparent inability of the plaintiff and other operators to furnish complete data for the calendar year 1922, until late in January.

On January 8, 1923, plaintiff advised the Commissioner of its waiver to receive said notice until March 1, 1923, and expressed the opinion that present conditions did not warrant any increase in prices, in view of the heavy increase which was made three years before, and the fact that the margin of profit had decreased rather than increased during the last three years.

As required by the terms of the contract, the Commissioner, on February 27, 1923, advised plaintiff, by telegram, that he had concluded that the stumpage rate for pine on Middle Mount Scott Unit should be increased 66¢ on April 1, 1923, making the new contract price \$4.90 per M feet, and that the price of white fir should be increased 25¢, making the price for that species 45¢ after April 1, 1923.

On February 28, 1923, the plaintiff, by telegram to the Commissioner, protested said advance, and asked for a rehearing, stating that it could not see how the rise in price was justified either by the experience of the past three years, or by the prospects for the next three years, although the then present market was temporarily very high. On March 1, 1923, the Commissioner advised the plaintiff that he would be pleased to consider any information or argument that plaintiff might present to him prior to April 1, 1923.

On March 24, 1923, plaintiff addressed a letter to the Commissioner, referring to its previous protest respecting the proposed 66¢ rise in price on Middle Mount Scott Unit, and advised that, after looking into the matter more carefully, it wished to withdraw its protest provided it could obtain an understanding that the matter would be reviewed on or about the first of April 1924, or 1925, in case the market dropped to such an extent that the recent rise would work a great hardship upon it. The plaintiff stated that it felt that deflation, common to nearly all industries, was coming to the lumber industry, and that the last two heavy advances in the price of stumpage might make the operation of its unit extremely unprofitable. The plaintiff stated that a further reason for the protest made by it was that competing companies operating

close to the Middle Mount Scott Unit on timber units controlled by the United States Forest Service had obtained stumpage prices more advantageous than those obtained by plaintiff. It stated, however, that as compared with other units on the Klamath Reservation, it had not been treated unfairly and that it might be possible, at the present rather inflated values in the lumber business, to make a reasonable profit at the new stumpage prices, provided such prices continue for a sufficient length of time.

On April 5, 1923, the Commissioner acknowledged the receipt of plaintiff's letter of March 24, 1923, and stated that the office understood plaintiff's letter to mean that it considered the advanced price of \$4.90 per M feet for yellow and sugar pine to be satisfactory on the basis of the market that had existed during the preceding three years; that plaintiff would ask reconsideration only on condition that there should occur thereafter such a marked decline in lumber values as to make the company's operation an unprofitable one, on the basis of the then existing stumpage price; that reference to the two dates, April 1, 1924, and April 1, 1925, was taken to mean that plaintiff might desire a revision downward of the price effective April 1, 1924, if there should occur a very marked decline of lumber prices during the year beginning April 1, 1923; and that should a serious depression occur during the year beginning April 1, 1924, plaintiff would expect the price to be lowered during the year beginning April 1, 1925. The Commissioner, in said letter, advised plaintiff that he considered its position a reasonable one and that he would be pleased to give consideration to the whole problem if conditions during the years beginning April 1, 1923, and April 1, 1924, disclosed that the new price of \$4.90 per M feet was an unreasonable one.

The Commissioner, in said letter, also advised plaintiff of his appreciation of its attitude at the time of the former readjustment, and also at the present one, and stated that:

"The purpose of the office in increasing stumpage prices has consistently been that of securing to the Indians every advantage to which they are justly entitled under the terms of the contract, and at the same time giving the fullest consideration to the legitimate interests of the purchaser of the timber. The office understands fully the uncertainty involved in the management of an operation so extensive as that of the Algoma Lumber Company and is desirous to maintain at all times a sympathetic interest in the success of those who are assisting in the realization of adequate prices for Indian timber."

10. The third price adjustment period provided by the contract commenced on April 1, 1926.

On December 22, 1925, the Commissioner advised plaintiff that his office had been unable to obtain, in sufficient time, the information from the plaintiff and other operators on Klamath lands upon which the readjustment should be based to make a final determination of the readjusted prices prior to February 1 of any year in which the

adjustment was to be made. Plaintiff was asked if it would consent to such notice being given on February 28, 1926.

By letter to the Commissioner dated January 2, 1926, the plaintiff consented to the requested extension of time. The letter contained the following statement:

"As rapidly as possible we will get our own records in such shape that you will have our results for the past year, and we believe we have already furnished you our results for the years 1923 and 1924. These results are such that certainly no increase in prices can be made without subjecting us to further severe losses unless lumber prices for the next three years should greatly exceed those of the past three years, and this latter condition seems unlikely, in view of the most reliable forecast concerning general building prospects for the future."

On February 24, 1926, Mr. Grant, plaintiff's secretary and manager, addressed a letter to the Commissioner, confirming a conversation that he had with the Commissioner and Mr. Kinney, advising that plaintiff was unable to stand any advance in stumpage price under its contract for the next three-year period; that the company made practically nothing on its investment during the past two years owing to low prices occasioned by general overproduction of lumber, notwithstanding that during those years there had
31 been the greatest demand ever known for lumber; and that future prospects indicated a decreased demand for lumber and lower prices. The letter also stated:

"Also we would call your attention to the fact that our timber was purchased at \$3.53 per M under a contract, the intent of which, we believe, was to divide the prospective advance in timber values between the Indians and ourselves, so that our present price of \$1.90 shows an advance over initial price of \$1.37. This \$1.37 is one-half of \$2.74 which, added to our original price of \$3.53, would give a value of \$6.27 before any further advance would be warranted under this theory."

Mr. Grant also called attention to the fact that the remaining timber on the unit was far below the average quality, and that the company could not expect to make the sales returns which it had been averaging under as good market conditions as had existed; that his company had an investment at Algoma in its mill, railroad, and logging equipment of over \$1,000,000; that in view of the great risks of the business, his company had hoped that its investment might net 12%, or \$120,000 annually, or \$3.00 per M on an estimated cut of 40,000,000 feet; that he believed his company was faced with the prospect of a net loss, even if stumpage prices were not raised.

On February 26, 1926, the Commissioner addressed the following telegram to the Superintendent of the Klamath Reservation:

"Advise Algoma and Lamm Lumber Companies there will be no increase in stumpage prices on April first."

On February 27, 1926, the Commissioner replied to plaintiff's letter of February 24, 1926, and advised that prior to receiving the company's letter,

"... final consideration had been given to the question of whether an increase of the price would be justified in view of market conditions and the terms of your contract for the purchase of this timber, and the Commissioner had instructed Superintendent Arnold of the Klamath Indian Reservation to advise your company that no increase would be made in the prices of the various species on April 1, 1926."

32 On December 7, 1926, plaintiff addressed a letter to the Superintendent of the Klamath Indian Agency, confirming a conversation with the Superintendent and Mr. Kinney, requesting permission to reduce the minimum to be cut from its reservation units during 1927 to 15,000,000 feet. This request was made for the reason that plaintiff had suffered a serious fire in one of its timber units during 1926.

On February 26, 1927, the Commissioner addressed the following wire to the Superintendent of the Klamath Indian Reservation:

"Advise Algoma Lumber Company and Lamm Lumber Company that prices of stumpage on Middle Mount Scott and Southern Mount Scott Units will not be increased April first, nineteen twenty seven."

On the same day, namely, February 26, 1927, the Commissioner addressed the following telegram to plaintiff:

"The price of stumpage on Middle Mount Scott Unit will not be increased April first, nineteen twenty seven."

On March 18, 1927, plaintiff addressed the following letter to the Commissioner:

"We are in receipt of a wire from you advising that the price of stumpage on Middle Mount Scott Unit in the Klamath Indian Reservation would not be increased April 1, 1927. We are a little puzzled by this wire, as our price was fixed a year ago for the three years next succeeding."

On March 30th, the Commissioner replied to the plaintiff's letter of October 18th, stating in the second and third paragraphs thereof as follows:

"April 1, 1926, was the regular period for the increase of stumpage prices on this unit. Because of unfavorable market conditions this Office did not think it advisable to increase the prices at that time and so advised you by letter of February 27, 1926. It was hoped at that time that there would be a substantial improvement in conditions prior to April 1, 1927. However, conditions have been such during the past year and the outlook for increased lumber prices during the year beginning April 1, 1927, is such that the Office thought it inadvisable to require any increase in price effective April 1, 1927, for the remaining two years of the three-year period."

33 "Should the market during the year 1927 be such that the Office shall feel at the close of the year that the deferred in-

crease in stumpage prices may fairly be made, you will be advised prior to February 1, 1928, unless you should readily consent as you have heretofore done, to leave this question open for an additional month.

On April 20, 1927, plaintiff acknowledged the receipt of the Commissioner's letter of March 30, 1927, and stated that the Commissioner's letter of February 27, 1926, made no reservation that the decision would hold for one year only and that under its contract prices were to be fixed for three years at that time, and it assumed that the prices made by the Commissioner's letter of February 27, 1926, would hold for three years, and that it had planned accordingly. Plaintiff also stated in its letter that it would like the Commissioner to confirm these prices for the remaining two years of the three-year period, and stated that the Commissioner apparently did confirm these prices in the second paragraph of his letter of March 30th, but with a reservation in the third paragraph.

On April 27, 1927, the Commissioner replied to plaintiff's letter of April 20, 1927, and stated that he did not understand how the plaintiff interpreted the second paragraph of the Commissioner's letter of March 30, 1927, to mean that there would be no rise on the Middle Mount Scott Unit until April 1, 1929; that the third paragraph of that letter made it clear that there might be an increase on April 1, 1928, which would apply to only one year. He also stated therein that he felt that plaintiff had been very fairly treated in the matter of stumpage price readjustments, and that if there should be an improvement in market conditions during the present year plaintiff could not reasonably object to an increase during the last year of the then present three-year period; that the plaintiff should recognize that the Commissioner had given full consideration to the depressed market conditions that had prevailed during the preceding two years, and that the increases made at the time of the first and second readjustments were much smaller than might have been made under the terms of the contract.

On May 6, 1927, plaintiff replied to the Commissioner's letter of April 27, and said that its contract provided that an increase could be made every three years if conditions warranted, and that such price should hold for the succeeding three years; that it had assumed that the price fixed by the Commissioner in 1926 would hold for the next three-year period, inasmuch as the Commissioner made no reservation at that time; that it was disappointed to note that the Commissioner wished to reserve the right to change the stumpage price on April 1, 1928; that lumber prices at the present time indicated that there would be little, if any, profit in the business for the current year.

On November 30, 1927, the Chief Supervisor of Forests addressed a letter to Mr. E. J. Grant, manager of the plaintiff, containing in its two final paragraphs the following:

"I, and all associated with me in the Forestry Branch of the Indian Service, feel very strongly that the price of \$4.90 now being

paid for stumpage on the Middle Mt. Scott Unit is considerably more than \$1.00 below the stumpage value of that timber as indicated by all sales made during the past six years. After a very liberal discount of the price on all recent sales, on the ground that sharp competition has advanced the price beyond the conservative market value of the same for a satisfactory profitable manufacturing process, we cannot escape the conclusion that the present stumpage price on the Middle Mt. Scott Unit is too low.

"Irrespective of the present weakness of the lumber market, I have decided definitely that I must recommend an increase in price on the said Unit effective April 1, 1928. I have not yet reached a conclusion as to the exact amount of the increase that I should recommend, in view of the present state of the market. As indicated above, all of us know that when comparison is made with all units sold on Klamath Reservation subsequent to 1923 the timber on the Middle Mt. Scott Unit should carry a stumpage charge in excess of \$6.00. However, we are disposed to give the fullest consideration to the fact that said unit was sold in 1917 and to concede that the advance in price on April 1, 1928, should be conservative. Argument to the effect that no increase should be made on April 1, 1928, would be fruitless, but it is quite possible that the amount of the increase could be established by agreement, and I believe it would be entirely proper for you to suggest the increase that you feel would be fair to the Indians and not burdensome to the Algoma Lumber Company."

35 On December 31, 1927, plaintiff replied to the letter of November 30, 1927, and after referring to the unsatisfactory conditions that had prevailed in the lumber business during the past year, expressed the view that the industry was facing further depressed conditions during 1928 and probably 1929. It stated that profit on its operations during 1927 was estimated at only \$35,000; that it had considerably over \$1,000,000 invested in plant and equipment and that it believed that owing to the unusual fire hazards it was entitled to a profit of 12% to 15% on its investment in equipment; that certain of its competitors were about to liquidate their investment in timber holdings, and that the Indian Service also was about to offer for sale several large tracts, to prevent further beetle damage, notwithstanding the prospects of a decreased demand for lumber; that in view of such conditions, it had hoped that the Supervisor might consider a decrease in the stumpage price; that it could not see the reasonableness of an increase, and could not understand why the Supervisor should consider a price increase in a year when, apparently, under the contract there was no legal right to increase the price, because the contract provided for prices to be changed only at three-year intervals, and the next price change period would be 1929; that unless conditions changed greatly prior to the spring of 1929, it could see no reason for a change, except downward, at that time.

11. On January 17, 1928, the Chief Supervisor of Forests addressed a letter to the Commissioner of Indian Affairs respecting the readjustment of stumpage prices on April 1, 1928, on several units of the Klamath Reservation. The Supervisor advised the Commissioner that on April 1, 1926, an adjustment of price was considered only for two units, namely, the Middle Mount Scott (Algoma Lumber Company) and Southern Mount Scott (Lamm Lumber Company); that because of the declining lumber market it was not possible to raise the price on these units if only the years 1923, 1924, 1925 were considered; that because of poor market conditions prevailing early in 1926, the office advised both the Algoma Lumber Company and the Lamm Lumber Company that no rise in price would be made on April 1, 1926; that in the early part of 1927 36 market prospects had been again poor and both companies had been again advised that no increase would be made on April 1, 1927; that the stumpage prices on contracts affecting five other units were also subject to adjustment on April 1, 1927; that with respect to these units no increase had been made in 1924 because of high initial prices and unsound conditions on several of these units; that no increases having been made in 1924, and competitive bidding on other units having indicated a marked rise in stumpage prices, notice was given in March 1927 to all of those companies of an increase of \$1.00 in price, but said increase was omitted for the year beginning April 1, 1927; that the Algoma Lumber Company, and the Lamm Lumber Company were both advised by him, when he was at Klamath, that he felt the price on both units should be raised on April 1, 1928; that both companies protested, but that he had no hesitation in saying that a rise of \$2.00 per M feet would not have made their prices comparable to the prices to be paid by several other companies after April 1, 1928; that he believed that some of the other companies had paid more than the timber was really worth and for that reason had never suggested a \$2.00 increase. He further stated that he had suggested a rise of \$1.00 per M feet and felt confident that the timber on both the Middle Mount Scott and Southern Mount Scott Units had a then present actual stumpage value, even on a weak market, more than \$1.00 greater than the prices that were then being paid; that after giving full consideration to existing conditions he had concluded that the price on both units should be increased the same amount as the other units, namely, 56¢, effective April 1, 1928. He further suggested that in May 1926 three Klamath units sold for \$7.29, \$7.84, and \$8.00; that these prices seemed to all timber men in the Indian Service to show that the Algoma and Lamm units were each worth at least \$6.00 per M, after making allowances for the unusually sharp competition in prices received in the latter sales; that when the time came for notice of readjustment early in 1927, the lumber market was in a deplorable condition and another "year of grace" was given the Algoma and Lamm Companies. The Supervisor further stated that he felt

37 the price to the Algoma Lumber Company and the Lamm Lumber Company should be increased at least 56¢ on April 1, 1928; that while he had considered fully the claim made by these companies that the Commissioner was "estopped" from increasing the price on April 1, 1928, because of his failure to make such increase on April 1, 1926, he did not feel that the language of the contracts should be construed in that manner, inasmuch as both companies in 1920, and again in 1923, asked and urged that the strict terms of the contracts be set aside so that their interests might be given equitable consideration; that this was done, and to all practical purposes a new basis of adjustment, namely, one of reappraisal, was adopted. The Supervisor of Forests and the Superintendent of the Klamath Reservation also signed the letter as agreeing with the statements of fact and conclusions of the Chief Supervisor of Forests.

On January 20, 1928, the Commissioner addressed a letter to plaintiff in which he reviewed the facts respecting his action under the contract with respect to the readjustment of prices on April 1, 1920, and again on April 1, 1923. With respect to the first adjustment date, namely, April 1, 1920, the Commissioner stated that the stumpage price of yellow pine was increased 67¢, or from \$3.57 per M feet to \$4.24; that the record showed clearly that under a strict interpretation of the terms of the contract the increase in price might have been more than equal to the original purchase price; that the small increase in price that was made was fixed after careful consideration had been given to all circumstances connected with the case, including a consideration of all increased costs of production; that the justification of the increase was demonstrated by reports filed by plaintiff with the Commissioner showing that plaintiff's profits during the years 1920, 1921, and 1922 had been twice the amount ordinarily to be expected in the lumber manufacturing business; that the increase of 66¢ in the stumpage price of yellow pine made under the contract, effective April 1, 1923, was but little more than $\frac{1}{6}$ of the net increase in the margin of profit realized generally in the Klamath District during the three years 1920, 1921, and 1922 over the average prices realized in 1917, 1918, and 1919; that the only justification for such a small increase in the stumpage price in-

38 crease, representing such a small fraction of the increase in margin of profit that could be consistently urged by the plaintiff or that could be conceded by the Service, was on the theory that the increased prices received during 1920, 1921, and 1922 could not be obtained during the succeeding three years, and that such increased prices had not been accompanied by a corresponding increase in stumpage values. In his letter the Commissioner also stated:

"At that time, as well as at the earlier adjustment, you urged that the provisions of the contract of purchase be not strictly enforced but that sympathetic consideration be given to the probabilities of greatly reduced prices in the future and that the indicated rise in stumpage be strongly discounted. It was in a spirit of cooperative

fairness and a desire not to impose any burdensome stumpage prices upon your company—that the small increase of 66¢ per M feet was established, making your new price only \$4.90 whereas other units of unquestionably lesser value had already been sold in the competitive market for more than \$5.00.”

The Commissioner further stated that subsequent sales in 1924, of less desirable units for \$4.78, \$5.53, \$5.72, and \$6.67, indicated that the Service had not realized how much stumpage values had risen, and also, that the prices for manufactured products obtained by plaintiff during the years 1923, 1924, and 1925, demonstrated that plaintiff's predictions and the estimates made by the Service early in 1923, as to the future, had not been sound; that it was the general opinion of all Forestry representatives of the Service familiar with the Klamath situation, that the stumpage price under plaintiff's contract should be increased on April 1, 1926; that market prospects for 1926 had been so unsatisfactory that the office advised plaintiff that no increase would be made on April 1, 1926; that similar market conditions prevailing early in 1927, resulted in a similar decision not to consider an increase on April 1, 1927; that on April 1, 1928, automatic increases became effective on several Klamath units, and increases imposed on other units on April 1, 1927, also became effective; that on most of these units the price of yellow pine, subsequent to March 31, 1928, would be above \$6.00 per M feet, and on 39 five units, none of which had an operative value equal to plaintiff's unit, the price would be above \$7.25 per M feet; that under the circumstances there was a very positive feeling in the Service that a large increase on plaintiff's unit was fully justified. The Commissioner further stated:

“However, I am informed as to your contention that an increase on April 1, 1928, cannot legally be enforced. While I believe you wholly unjustified in raising this technicality, in view of the equitable treatment that has heretofore been accorded your company, I am quite ready to admit that the imposition of an increase without your consent would be open to criticism as an arbitrary exercise of discretion and might even be subject to attack on the ground of illegality.

“Under such circumstances I wish to inquire whether you will not voluntarily agree to an increase of 56¢ per M feet in the price of yellow pine cut from the Middle Mount Scott Unit during the year beginning April 1, 1928? I assure you that it is the opinion of all forestry men in the Indian Service who are familiar with the Klamath situation that an increase of \$1.12 on this unit, making the price \$6.02, would not equal its value as compared with other units now being operated, but in view of the existing doubt as to the authority of this office to increase the price at its discretion, I would consider a compromise agreement on a raise of 56¢, making your price for the coming year \$5.45 per M as a satisfactory adjustment.

“I recognize fully your duty to safeguard the interests of your company. I hope you will recognize my duty of protecting the interests

of the Klamath Indians and I trust that you will not overlook the consideration which this Service has heretofore given your company in construing the terms of the contract equitably rather than strictly."

On January 30, 1928, the Commissioner addressed the following telegram to the plaintiff:

"Please wire today whether you accept suggested compromise of fifty six cents increased price Klamath timber."

On January 30, 1928, plaintiff addressed the following telegram to the Commissioner:

"Yours thirtieth our loss last year on Middle Mount Scott
40 operations was five thousand exclusive of any interest on our own or borrowed capital stop We would like to have time to present these reports and also have you give consideration to reports of other operators to determine if our operation is inefficient stop Market conditions are more unfavorable now than a year ago we wish to waive for this year any right we might have to insist upon a price determination by February first and extend time to April first."

On January 30, 1928, plaintiff replied, by letter, to the Commissioner's letter of January 20, and stated, in substance, that it did not wish to take an arbitrary stand in the matter, and hoped the Commissioner would examine into the question of plaintiff's profit for the past year, and also compare its efficiency with other operators in the District. In its letter plaintiff stated, among other things:

"We went into the Middle Mount Scott Unit as the first large sale which was made of Klamath Indian Reservation timber, and in effect, the contract reads that the advance in the price of lumber, taking into account changes in operation cost, is to be divided between the Indians and ourselves. At our present stumpage price you are now giving the Indian Reservation \$1.37 above the bid price on every thousand feet of timber which we cut. This presupposes that the present market and labor conditions will return to us an increased profit of \$1.37 over market and labor conditions such as existed in 1917, the year in which we purchased this Unit. Instead of this, we maintain that our profit has been entirely cut out by the advances already made, and we think it an injustice that you should consider further advances until conditions have considerably improved. The fact that there has developed during the past few years a temporary shortage of timber in the Klamath section, and that some mills have bid very exorbitant prices for it, and are no doubt protesting against our low prices, should not be a factor in penalizing us. There is certainly nothing in our contract which suggests any equalizing of our stumpage prices with any which others may be paying or bidding. We are of the opinion that all of the operators paying \$6.00 per thousand or over for stumpage in the Klamath Indian Reservation will be in the hands of their creditors within a very few years, as the price is a false and artificial one which seemed warranted by conditions of several years ago, but is certainly not warranted by the conditions of to-day."

Plaintiff acknowledged that it had made a very good profit in some of the past years, under the contract, but stated that this profit had largely been put back into plant improvements at Algoma to reduce costs; the letter also referred to plaintiff's Antelope timber purchase; it stated that on top of these plant expenditures, the company had suffered losses on account of two forest fires, and also the burning of its Montague Plant. In its letter plaintiff said: "We make mention of these facts to show the risks involved in the lumber business and to further show that we are not in a position to pay the Indians a price for their timber beyond that at which we are able to make a profit."

On March 14, 1928, plaintiff addressed a letter to the Commissioner, referring to its telegram and letter of January 30, and stated that it would like to extend to May 1 the time for determining the price readjustment; that the lumber business was in very bad shape, and until conditions improved it could not pay a higher price and conduct its business at a profit; and that such a condition would be extremely unfair to it.

On March 23, 1928, the Commissioner advised plaintiff, by letter, that it was expected that final determination as to the price adjustment on the Middle Mount Scott Unit would be reached before April 1, 1928; that since the contracts provided for all changes in prices on April 1, it did not appear advisable to delay the decision until May 1, as suggested.

On March 24, 1928, the Commissioner addressed the following telegram to plaintiff:

"Decision reached increase price Middle Mount Scott Unit Forty Cents effective April first period. Hope you will recognize entire fairness this increase."

On March 26, 1928, plaintiff replied to the Commissioner's telegram of March 24, and stated that it felt that the rise was unwarranted and unfair at that time, under the rights given to it by its contract. In the final paragraph of its letter plaintiff asked:

"If we decided to accept this increase without further complaint, may we have your assurance that no increase in price will be made on our unit next season, and that consideration will be given to a reduction in price in case we make no profit this year with operating efficiency as good as the average in the Klamath Falls District?"

On April 4, 1928, the Commissioner replied to plaintiff's letter of March 26, 1928, and stated that he would hesitate to even suggest that plaintiff's operation was inefficient, as compared with other operators in the Klamath Region, but that a reply to plaintiff's inquiry necessitated the observation that the profit shown on financial and operating statements submitted by the Algoma Lumber Company had generally been substantially below that shown by other companies operating in the Klamath Basin, and that this was true also of reports for the year 1927; that in view of the fact that the oper-

ating value of the Middle Mount Scott Unit had universally been considered as among the three or four highest units on the Klamath Reservation, while the stumpage price thereon ranked as one of the four lowest, the office was forced to conclude that either the efficiency of plaintiff's organization was somewhat less than that of those showing better results, or that plaintiff's system of accounting was such that it did not show results to be as favorable as they actually were. The Commissioner advised plaintiff that he could not at that time assure it definitely that there would be no increase on April 1, 1929; but that should the major part of plaintiff's logging operations be conducted on the Middle Mount Scott Unit during 1928, and yet with average operating efficiency plaintiff should realize no profit, the office would not decline to consider an application for a reduction in price, but that in view of all the circumstances it did not appear probable that any reduction could be made on April 1, 1929. The Commissioner also said that the increase in price, effective April 1, 1928, was considered in the light of an adjustment of stumpage value to date,

"* * * and while the office feels that the new price of \$5.30 does not represent the full value of the Middle Mount Scott stumpage on a competitive market basis, it concedes that this new price par-takes of the nature of a compromise as to the increase that
43 may be imposed on the basis of market prices to the end of the year 1925, and any increase that may be imposed on April 1, 1929, will be based upon the market during 1926, 1927, and 1928, as compared with that for 1923, 1924, and 1925."

12. On April 4, 1928, plaintiff addressed a telegram to Senator Frederick Steiwer, requesting that its name be added to the list of Klamath operators affected by the increase of 40¢ in the stumpage price being made by the Indian Bureau; that it considered the increase very unfair and hoped that a reconsideration of the matter might be obtained.

On April 7 the Commissioner replied to the Senator's letter of April 5, and advised that he had carefully considered the Senator's presentation of a telegram from the Algoma Lumber Company with respect to the 40¢ increase in stumpage price effective April 1, 1928, and that:

"A careful review of this case convinces me that the action that was taken was proper under the circumstances and I do not feel that I would be justified in the cancellation of the increases."

On April 18, 1928, the plaintiff replied to the Commissioner's letter of April 4, 1928, and reiterated its belief that the advance in stumpage price recently made was both unfair and not legally justified under the rights given to the Commissioner by the Middle Mount Scott contract. The plaintiff inquired whether the Commissioner would be antagonized by a friendly suit at law to determine the legality of his action in making the advance. The final paragraph of the plaintiff's letter was as follows:

"We note that no bids at all were received on the last two units offered by the Klamath Indian Reservation although prices were

around \$5.00 per M feet, and many mills in this district are desperately in need of additional stumpage. Is this not sufficient proof to you that the lumber business is not in the prosperous condition which you seem to assume?"

On May 2, 1928, the Commissioner replied to plaintiff's letter of April 18, 1928, and assured plaintiff that any appeal it might wish

44 to pursue in regard to the reappraisement of the Middle Mount Scott Unit stumpage would not prejudice the friendly relations now existing between his office and plaintiff company.

The Commissioner further stated, in reply to an inquiry made by plaintiff in its letter, that he could see no connection between the stumpage price readjustment of the Middle Mount Scott Unit, and the lack of bids on two badly insect-infested units located on the east boundary of the Klamath, requiring very large developing expenditures; and called the plaintiff's attention to the fact that the proposed contract for those two units required the cutting and removal of 25,000,000 feet of timber prior to March 31, 1929, and that the purpose of that provision, and the decision to offer the units in the first place was to effect, if possible, beetle control on the Klamath.

On September 29, 1928, plaintiff addressed a letter to the Commissioner protesting the 40¢ increase in the stumpage price under its Middle Mount Scott Unit contract, effective April 1, 1928, and served notice that the cash advances paid by it to the Superintendent of the Klamath Reservation, under the terms of its contract, should not be applied at a rate greater than \$4.90 per thousand feet for yellow pine, sugar pine, and incense cedar; that said protest was a continuing one, and if payments were made, except as directed in its notice, plaintiff would seek to recover from the Government the amount of the excess so paid.

On October 8, 1928, the Commissioner referred plaintiff's letter of protest to the Chief Supervisor of Forests, and the Forest Valuation Engineer, for report and recommendation. On October 29, 1928, these persons advised the Commissioner, by letter, that in their judgment the increase of 40¢ per thousand was very conservative; that the Unit was a very desirable one, having a cut per acre of 20,000 feet B. M., as compared with 15,000 feet B. M. for the average area on the Reservation; that the increased price paid by plaintiff was one of the lowest in effect in that competitive field; that the action taken was supported by the favorable trend of the market since April 1, 1928; and recommended that no further action be taken in the matter in view of the very favorable consideration given to plaintiff in connection with the revaluation made effective April 1, 1928.

On November 9, 1928, the Commissioner acknowledged the receipt of plaintiff's letter of September 29, 1928, protesting the 40¢ price increase made effective April 1, 1928, and advised that he had given careful consideration to the matter presented, and was still of the opinion that the increase in price of 40¢ per M on the Middle Mount Scott Unit, effective April 1, 1928, was fully justified.

13. In the Klamath District, the income from the industry as a whole, that is, of those corporations operating on the Klamath Indian Reservation, was for the period 1923 to 1929, inclusive, as follows:

Year:	Net Income
1923	\$345,452.89
1924	292,574.55
1925	648,519.12
1926	501,019.90
1927	37,798.03
1928	461,566.42
1929	118,532.67

This income reflected a return on the investment (net worth) of the following:

	Percentage
1923	9.7
1924	5.4
1925	10.8
1926	5.0
1927	0.36
1928	3.9
1929	1.3

14. The fourth price adjustment period under the contract commenced on April 1, 1929.

On January 21, 1929, the Commissioner, by letter, requested plaintiff to consent to the receipt of notice relating to the price adjustment under the contract any time prior to April 1, 1929. The letter stated that this request was made because of the delay on the part of the plaintiff and other companies in furnishing information as to sales and costs in sufficient time to enable the Commissioner to determine what price adjustment, if any, should be made under the contract.

The Commissioner in his letter advised plaintiff that his information indicated that the prices to be paid after March 31, 1929, should be the same as then prevailing under the contract, namely, \$5.30 per thousand feet for yellow and sugar pine, and the same prices then being paid for other species, but that if cost and sales data to be obtained from the various Klamath operators should indicate that higher prices should be fixed for any of the species, plaintiff would be afforded an opportunity to show why no such price increase should be made effective. Plaintiff, on January 30, 1929, advised the Commissioner that it consented to the receipt of the required notice for April 1, 1929.

On February 12, 1929, the Superintendent of the Klamath Reservation advised the Commissioner that he had received financial statements from the Forest Lumber Company, Chilouquin Lumber Company, Ewauna Box Company, Campbell-Towle Lumber Company, Big Lakes Lumber Company, and Shaw-Bertram Lumber Company, but that he had not received a similar report from the plaintiff; that the plaintiff had recently advised that its financial statement would not be ready to submit prior to April 1.

On February 14, 1929, the Forest Valuation Engineer of the Indian Service advised the Commissioner, by letter, that the Algoma

Lumber Company had not submitted a financial statement, and had advised that such report, by reason of the non-closing of its books until February 28, 1929, would not be available until about April 1; that in these circumstances he would not be able to submit his report until the last of March or early in April.

On May 4, 1929, the Commissioner advised plaintiff, by letter, that the submission of the Forest Valuation Engineer's report had been greatly delayed because of plaintiff's inability to furnish a financial statement with respect to its operations for the year 1928; that in view of the data obtained from the various companies, and from other sources, as to cost and sales prices during the calendar year 1928, he had concluded that the prices for stumpage cut from the Middle Mount Scott Unit during the year beginning April 1, 1929, should remain the same as those paid during the year beginning April 1, 1928.

On May 15, 1929, plaintiff replied to the Commissioner's letter of May 4, and protested against the stumpage price increase effective April 1, 1929. The protest was based on the same facts which it relied upon to support its protest made in 1928, and the further fact that conditions warranted no increase in stumpage price starting in 1929.

On June 19, 1929, plaintiff addressed a letter to the Commissioner, referring to its previous letter of September 29, 1928, wherein it protested against the increase of 40¢ per M feet for pine on the Middle Mount Scott Unit, and also to its letter of May 15, 1929, protesting against the increase in price effective April 1, 1929. Plaintiff protested that no part of the deposits made by it should be applied to the payment for stumpage at a rate greater than \$4.90 per thousand feet for yellow and sugar pine, and incense cedar. The Commissioner was advised that if any payments were made in excess of that sum plaintiff would take such action as necessary to recover from the Government the excess amount so paid.

On August 23, 1929, the Commissioner advised the Superintendent of the Klamath Reservation that plaintiff had protested the payment of 40¢ advance in price of yellow pine and sugar pine, effective April 1, 1928, on the Middle Mount Scott Unit, and that pending the final disposition of plaintiff's appeal a sufficient amount should be retained in all individual Indian accounts to cover a refund of 40¢ per M feet on all timber cut from particular allotments and paid for at the advance price, effective April 1, 1928.

On March 22, 1930, plaintiff requested the Commissioner to consent to the reduction of the minimum quantity of timber required to be cut by plaintiff under its contract. On March 27, 1930, the Commissioner wired plaintiff that the cut made by it on the Middle Mount Scott Unit during the preceding logging season would be accepted as a compliance with the contract cutting requirements on the Middle Mount Scott and Antelope Valley Units.

On December 3, 1930, plaintiff forwarded to the Superintendent of the Klamath Reservation duplicate invoices for \$25,094.56, the

amount allegedly overcharged on timber cut by plaintiff during 1928, 1929, and 1930, under its Middle Mount Scott Unit contract. The letter contained the following paragraph:

"We have not yet started suit in the Court of Claims for recovery of this amount, as we have it in mind to await the result of the suits now pending by the Lamm Lumber Company and the Forest Lumber Company, whose claims against you are based upon much the same grounds as our own. During a recent trip to Washington I talked with Mr. Kinney about this matter, and he told me that he saw no reason why our claim could not be allowed without a suit, providing precedents favorable to us were established by the decisions in these other cases."

On December 28, 1931, the Supervisor of Forests, Klamath Agency, Oregon, certified that the plaintiff had satisfactorily completed operations under its Middle Mount Scott Unit contract.

Scaling began November 5, 1917, and was completed April 30, 1930. The total footage of timber of all species cut by plaintiff under its contract on tribal and allotted lands was 316,879,370 feet, valued at \$1,460,950.95. The total quantity of yellow pine cut by plaintiff from tribal land under its contract was 240,781,900 feet board measure, valued at \$1,157,040.73. It cut 72,354,080 feet board measure of yellow pine, valued at \$300,642.35 from individual Indian allotments; or a combined total quantity of yellow pine cut from tribal and allotted lands of 313,135,980 feet board measure, valued at \$1,457,683.08. The value of all species of timber other than yellow and sugar pine cut from tribal land and also allotments was \$3,267.87, or a total value of \$1,460,950.95.

For the first three-year period under the contract ending March 31, 1920, plaintiff paid for yellow and sugar pine a stumpage price of \$3.57 per M feet B. M.; for the second three-year period ending March 31, 1923, plaintiff paid \$4.24; and for the third three-year period ending March 31, 1926, plaintiff paid \$4.90. Beginning April 1, 1928 (the third year of the fourth three-year period, which began April 1, 1926), plaintiff paid \$5.30; for the fifth period beginning April 1, 1929, plaintiff paid \$5.30 per M feet B. M. The average stumpage price paid by plaintiff for yellow and sugar pine under the contract was 4.5025 per M feet B. M.

15. From April 1, 1928, to March 31, 1929, plaintiff cut 26,019,330 feet board measure of yellow and sugar pine, as shown by the records in the office of the Superintendent of the Klamath Indian Reservation. That quantity of timber multiplied by 40¢, the amount of the challenged price increase made effective on April 1, 1928, totals \$10,407.73.

16. From April 1, 1929, to March 31, 1930, plaintiff cut a total of 31,633,190 feet board measure of yellow and sugar pine, as shown by the records in the office of the Superintendent of the Klamath Indian Reservation. That quantity of timber multiplied by 40¢, the amount of the challenged price increase effective April 1, 1929, totals \$12,653.28.

During the contract period beginning April 1, 1930, and ending March 31, 1931, plaintiff cut a total of 5,083,870 feet board measure of yellow and sugar pine, as shown by the records in the office of the Superintendent of the Klamath Reservation. That quantity of timber multiplied by 40¢ per M feet board measure, the amount of the challenged price increase paid during the period beginning April 1, 1930, totals \$2,033.55.

17. The total quantity of yellow and sugar pine cut by the plaintiff during each of the yearly contract periods beginning with April 1, 1928, and ending with March 31, 1931, totaled 62,736,390 feet board measure. That quantity of timber multiplied by 40¢ per M feet, the amount of the challenged price increase made effective under the contract April 1, 1928, and which continued in effect during the remainder of the contract period, totaled \$25,094.56.

18. During the 14 years prior to 1931, the Indian Service made an investigation and study of the comparative production costs and selling price trends of timber within the Klamath Region for the purpose of establishing a sound basis to guide the Commissioner of Indian Affairs in determining the stumpage rates to be fixed by him during each of the three-year periods specified in the contract.

The area specified in the contract of July 28, 1917, as "the Southern Oregon and Northern California region" had always been understood by lumbermen and engineers familiar with the locality as embracing the Klamath Region. Speaking generally, this region is a definite economic unit in the lumber industry and is composed primarily of Klamath County, Oregon, and also small parts of Lake

County, Oregon, and Modoc County, California. Topographically this economic unit embraces the Klamath Basin which is bounded on the west by the Cascade Mountains; on the north by the divide between the waters of the Williamson and Deschutes Rivers; on the east by the Lake View Basin; and on the south by the Lava Beds of Northern California. The principal producing center of this region is Klamath Falls, Oregon. Lumber manufacturing operations are, comparatively speaking, centralized within the vicinity of that place, and all the larger companies located there operate under similar physical and industrial conditions, and distribute their products through the same markets.

During each year from 1917 to 1931, the Indian Service compiled statistical information covering the market price and production cost trends of lumber in the Klamath Region, which data was abstracted from the certified operating statements of the principal lumber-producing companies operating within the Klamath Region. These certified statements were submitted to the Commissioner of Indian Affairs by the various companies competing for timber within the Klamath Reservation, and form a part of the permanent record of his office.

To assist the Commissioner of Indian Affairs in making the stumpage price adjustments under the contract, he assigned an expert timber valuation engineer to make a special study of production costs

and sale price trends of lumber at the mills within the Klamath Region, and to submit yearly reports showing the trends of such costs and sales prices within that region. Such reports were made for the years 1920, 1923, 1924, 1926, 1927, 1928, 1929, 1930, and 1931. This valuation engineer was thoroughly familiar with the timber within the area covered by the contract, having been assigned to survey that timber as early as 1913. All the yearly reports touching the price trends within the Klamath Region were made to the Commissioner of Indian Affairs by this engineer. The reports were comprehensive and considered all factors affecting the trend of production costs and selling prices of timber within the area specified in the contract.

51 Plaintiff and other timber producing companies operating within the Klamath Region were members of the California White and Sugar Pine Manufacturers Association. It was the practice of the plaintiff and other members to furnish to the association statistics respecting operations, volume production, grades, and prices received for each individual order which was shipped. This association published annually statistical statements containing an analysis of lumber prices of pine and other species of timber grown within the area defined in the contract. These statements showed summaries of inventories, orders, stocks, and comparative data on production at member mills in Oregon and California. A synopsis of the grade prices of California white pine, as shown by these statements, was incorporated in the valuation studies conducted by the Indian Service for the purpose of determining the readjustment of stumpage prices under contracts affecting the Klamath Indian Reservation in Oregon.

These statistical statements were compiled for the purpose of furnishing contributing members with information respecting the prices of upper grades of lumber. Prices which covered the lower grades, namely, box and common, and which constituted more than 65% of the log, were not reported.

19. The record in this case shows that about 60% of the timber cut by plaintiff, under the contract in suit, was made by it into box shooks, and that the annual statistical statements published by the California White and Sugar Pine Manufacturers Association did not show the prices received by plaintiff for the box shooks manufactured by it. Because of the omission of these data, the average mill run wholesale net value of lumber f. o. b. mills, as defined in the contract, could not be determined from the annual statistical statement published by the California White and Sugar Pine Manufacturers Association. The information contained in these statements was used only for comparative purposes by the Commissioner of Indian Affairs in determining the stumpage price adjustments under the contract, and never formed the basis of determination in connection with stumpage price readjustments, because of the inapplicability of the data contained therein to the procedure specified in the contracts.

52 In determining the regional average figures covering both production costs and sales prices, the valuation engineer followed a method intended to secure directness and mathematical simplicity. He computed the net return from sales after all adjustments for commissions, freight, etc., had been divided by gross volume sold to show average price; and the total volume sold, divided by total costs of sales, to show average unit cost. The final yearly audits of the various corporate purchasers of timber operating within the Klamath Region, as certified by their respective accountants, were totaled and direct averages obtained. The Valuation Engineer, representing the Indian Service, was thus enabled to establish for each year the average mill run wholesale net value of lumber at mills in the Klamath Region in Southern Oregon and Northern California, as defined in the contract.

The Klamath Region is noted for its fine quality of pinus ponderosa (a species of Western yellow pine). Because of its fine texture and adaptability for various commercial uses, lumber produced from that species of pine, for many years prior to 1931, entered Eastern markets under the descriptive classification of California white pine, in competition with the celebrated Northern or true white pine. There was sharp competition between rival lumber companies operating within the Klamath Region for the stumpage on the Klamath Reservation.

The highly competitive stumpage market that developed within the Klamath Region during the period of this contract was unprecedented and not foreseen by persons conversant with the trend of lumber prices. This highly competitive situation was aggravated by the post-War boom, which caused the values of stumpage to advance more rapidly than in any other known comparable area.

In the determination of the production costs of timber the cost of stumpage is one of the most important single factors to be considered.

The statistical studies and reports made by the Valuation Engineer show that during the contract period the average mill run net wholesale value of pine lumber within the Klamath District fluctuated from a low of \$17.49 in 1917 to a high of \$42.44 in 1920.

53 Sales prices remained at comparatively high levels from that year through to 1925, and thereafter gradually declined to \$24.73 in 1927, rising again to \$25.50 in 1929.

Production costs within the same area showed a corresponding fluctuation during the period in question, rising from a low of \$15.33 per M feet in 1917, to a high of \$30.70 per M feet in 1920. Production costs remained at a comparatively high level through 1923, the level for that year being \$28.01 per M feet, and gradually declined thereafter to \$23.38 in 1928, again rising to \$25.07 in 1929.

From 1917 to 1929 the stumpage prices of pine timber in the open competitive market in this area ranged from a low of \$3.25 to a high of \$8.00 per M feet. The record shows that the prices of stumpage within the pertinent period of the contract fluctuated greatly. The

graph, evidencing the trend of stumpage prices within this competitive area, reflects only a comparatively slight increase in prices during and immediately following the years of highest sales prices for lumber, namely, 1919 to 1923, with frequent recessions in the stumpage price trend during that period. In 1917 the average sale price of stumpage within the competitive area was \$3.44; whereas in 1927, the average sale price of stumpage within the Klamath Region was \$7.64 per M feet.

The statistical studies and reports made by the valuation engineer show that during the contract period the average millrun net wholesale value of pine lumber within the Klamath District fluctuated as follows:

Year:	Average Millrun Net Wholesale Value of Pine Lumber Per M.
1917	\$17.40
1918	22.96
1919	27.46
1920	42.44
1921	28.50
1922	31.71
1923	30.37
1924	27.51
1925	27.48
1926	26.36
1927	24.73
1928	24.75
1929	25.50

54 Production costs for said years within the same area as shown by said statistical studies and reports were as follows:

Year:	Production Cost Per M.
1917	\$15.33
1918	21.52
1919	25.43
1920	30.70
1921	27.79
1922	27.59
1923	28.01
1924	25.59
1925	24.62
1926	24.37
1927	24.45
1928	23.36
1929	25.07

20. The limitation imposed by the contract on the discretionary authority of the Commissioner, with respect to fixing the stumpage rates to be paid during each of the three-year periods specified therein, was the proviso that such advance in stumpage rates, as determined at the close of each specified period, "shall not exceed fifty per cent of the increase in the average mill run wholesale net value of lumber at mills in Southern Oregon and Northern California during the three years preceding January 1 of the year in which the new prices are fixed."

At the time of imposing the stumpage price increases, effective April 1, 1920, and April 1, 1923, for the first and second price re-adjustment periods specified in the contract, it was understood by

plaintiff and other purchasers that the Commissioner of Indian Affairs would reconsider his action, and reduce such price increases during any year following the year that the price increase was made should market conditions warrant such action. The contract contained no provision for a reconsideration by the Commissioner of the stumpage price within any three-year period.

On April 1, 1926 (the third price adjustment period prescribed in the contract), plaintiff was advised, by telegram from the Commissioner, that the price would not be increased on that date.

55 That year the lumber market was seriously depressed, and the Commissioner, responsive to the urgent appeals made by plaintiff and other timber purchasers, deferred putting into effect a price increase during that year. Officials of the Indian Service had considered putting into effect a price increase on April 1, 1926, but the Commissioner did not believe it would be fair to impose such a price increase, because of the uncertainty of the future market.

The depression that affected the lumber market in 1926 continued into the year 1927, and prior to April 1 of that year the Commissioner notified the plaintiff that no increase in price would be made effective April 1, 1927. This action was taken by the Commissioner because of the general weakness of the then existing lumber market.

The matter of increasing the stumpage price, effective April 1, 1928, was the subject of considerable correspondence between the plaintiff and the Commissioner, subsequent to April 1, 1927, and early in 1928. The plaintiff at that time protested that the contemplated action of the Commissioner was contrary to the terms of the contract, and that present and prospective market conditions were not favorable.

Plaintiff originally bid a price of \$3.57 per M feet board measure for yellow pine. That price continued in effect until March 31, 1920. On April 1, 1920, the stumpage price was increased by 67¢, making the price for the following three years ending March 31, 1923, \$4.24. On April 1, 1923, the price was further increased by 66¢, making the new price \$4.90, effective for the following three-year period, ending March 31, 1926. That price remained in effect until April 1, 1928, when it was increased by 40¢, making the stumpage price for the last year of the third three-year period \$5.30. On January 21, 1929, the plaintiff was advised by the Commissioner that information before his office indicated that the price of yellow and sugar pine, subsequent to March 31, 1929, should be \$5.30 per thousand feet, and the same prices for other species then being paid. On May 4, 1929, the Commissioner advised plaintiff that he had concluded that stumpage prices to be paid under the contract for 56 the year beginning April 1, 1929, should be the same as the prices paid during the year beginning April 1, 1928.

In determining the action to be taken in imposing the price increase of 40¢ on April 1, 1928, and again on April 1, 1929, the Commissioner was guided by many factors, and not by any one particular

factor. Consideration was given to the fact that there had been a large increase in stumpage values on the Klamath Reservation and adjacent areas. There had been a reduction in manufacturing costs. Price increases in 1920 and 1923 (the first and second price adjustment periods) were only fractional parts of the price increases that might have been imposed in those years. That action was taken because the plaintiff and other purchasers pleaded that they could not afford to pay higher prices, and the Commissioner tried to be fair with the lumber companies, and at the same time protect the interests of the Klamath Indians. Moreover, it was understood by the plaintiff and the Commissioner that in 1921 and 1922 the price increase made effective April 1, 1920, would be reduced if market conditions warranted such action. Again in 1923 the plaintiff requested, and the Commissioner agreed, that he would reduce the stumpage price increase in 1924 or in 1925, should market conditions in either of those years warrant such action. There had been a decrease in the average mill run net wholesale prices of lumber within the area defined in the contract, at the pertinent time.

21. The sale of timber upon the allotted and unallotted lands of the Klamath Indian Reservation was authorized by the Act of June 25, 1910, Sections 7 and 8 (36 Stat. 855, 857). Regulations promulgated by the Secretary of the Interior, as required by that Act, prescribed in detail the procedure to be followed in the sale of timber, and the disposition of the proceeds thereof. The declared purpose of the regulations was "to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." The department of the Government engaged in the administration of Indian Affairs has always treated the Indian Forests as private property, held in sacred trust by the United States, for the Indians.

On some reservations the merchantable stand of timber was 57 practically the only source of revenue from which the cost of social and industrial betterments for the Indian Tribe could be met by the Indian Service.

The form of contract of July 28, 1917, except for minor modifications, providing particularly for a fixed increase in the price of stumpage every three years, has been used in every sale of timber on Indian reservations since the passage of the act of June 25, 1910.

In 1923 a form of contract was adopted for the sale of Indian timber, providing for fixed stumpage price increases every three years. Under that form of contract the price to be paid for the first contract period was stipulated. For each of the remaining three-year periods it was stipulated that the purchaser of the timber would pay the prices paid during the preceding three-year period, plus 12% thereof. The modified form of contract also contained a provision authorizing the Commissioner to relieve the purchaser from all or any part of the increase in price under the original contract stumpage price should the Commissioner be satisfied, after investigation, that notwithstanding efficient operations, the purchaser was unable to make a profit under the then existing market conditions. The contract also

contained a proviso that the reduction should never be less than the stumpage price specified during the first period of the contract. The Commissioner also reserved the right to reimpose any part, or all the increases at any time, upon giving notice to the purchaser, subject to review by the Secretary of the Interior. Except as indicated above, the modified form of contract adopted in 1923 was substantially the same in form as the contract approved by the Secretary of the Interior and used in connection with the sale of timber on Indian reservations under the 1910 Act.

Contracts for the sale of timber from unallotted lands of Indian reservations made prior to the act of June 25, 1910, were substantially similar in form to the contract of July 28, 1917, so far as relates to the designation of the parties thereto.

The practice followed by the Bureau of Indian Affairs in the sale of timber on Indian reservations under the act of June 25, 1910, was uniform. Whenever the Commissioner of Indian Affairs determined that timber on Indian reservations should be sold; the practice followed in all cases was for the Superintendent of the Indian Reservation to advertise definite units of timber for sale; accept bids and forward an abstract of such bids to the Commissioner of Indian Affairs in Washington, together with his recommendation respecting the award to be made.

The contract was then prepared on the form prescribed by the regulations, and signed by the Superintendent on behalf of the tribal Indians. When signed by the purchaser, the contract was forwarded by the Superintendent to the Commissioner of Indian Affairs for approval, either by him or by the Secretary of the Interior, depending upon the value of the timber involved in the contract of purchase.

Article 2 of the Tribal Timber Contract of July 28, 1917, authorized the purchaser of tribal timber to make separate contracts with those Indians holding allotments within the sale area covered by the tribal contract who desired to sell the timber thereon. Plaintiff entered into contracts with 21 Indian allottees holding allotments within the sale area designated in the tribal contract, namely, Middle Mount Scott Unit.

These allotment contracts were subject to the same procedure with respect to the making thereof, and prices to be paid for the timber, as was followed in the making of the tribal timber contract; that is, contracts for sale of timber, either upon unallotted or allotted lands, were made under the supervision of the Secretary of the Interior, but plaintiff made all contracts for the purchase of timber on allotments held by individual Indians with the holders of such allotments.

Collections of the stumpage prices paid under these allotment contracts were made by the Superintendent of the Reservation, under the tribal contract; that is, in the administration of the contracts for the purchase of timber within the Klamath Reservation, growing upon either unallotted or allotted lands, the collections were made as if only one contract was involved.

59 No contracts for the sale of Indian tribal timber have been made, in the form and manner prescribed by R. S. 2103. Contracts for the sale of Indian tribal timber have always been made substantially in accordance with the form of contract involved in this suit.

Contracts for the sale of timber on unallotted or allotted lands within Indian reservations have always been considered by the purchasers of timber, and by the administrative department concerned, to be contracts made for the respective tribal or individual Indians designated therein, and such contracts have been made under the supervision of the Secretary of the Interior, and specifically the Commissioner of Indian Affairs, for the sole benefit of either the tribal or individual Indians concerned.

22. The purchaser, as required by the terms of the tribal timber contract of July 28, 1917, and the several contracts made by it with individual Indian holding allotments within the sale area designated as the Middle Mount Scott Unit, paid to the Superintendent of the Klamath Indian School the sum of \$1,460,950.95. Of this sum, \$1,159,494.52 represented payment for various species of timber cut from tribal lands. The remaining \$301,456.43 represented payments for various species of timber cut from allotments held by individual Indians.

The act of March 3, 1883 (22 Stat. 582, 590), as amended by the act of May 17, 1926 (44 Stat. 560), provides in substance that the proceeds of sales of timber on any Indian reservation, except those of the Five Civilized Tribes, shall be covered into the Treasury under the caption "Indian moneys, proceeds of labor," for the benefit of such tribes and under such regulations as the Secretary of the Interior shall prescribe.

The act of March 2, 1887 (24 Stat. 449), vested in the Secretary of the Interior discretionary authority to expend such proceeds for the benefit of the respective tribal Indians concerned.

Section 27 of the act of May 18, 1916 (39 Stat. 123, 158), prescribed the procedure to be followed thereafter with respect to the expenditure of tribal Indian funds covered into the Treasury and deposited to the credit of the tribes, pursuant to the acts of March 3, 1883, and March 2, 1887.

60 The act of March 2, 1907 (34 Stat. 1221), authorized the Secretary of the Interior, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he might deem to be capable of managing his or her affairs, and to cause to be allotted to such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which such Indian was a member, and to place such pro rata share of such fund to the credit of the Indian concerned, upon the books of the Treasury, and subject to the order of such Indian.

The acts of April 30, 1908 (35 Stat. 70), and June 25, 1910 (36 Stat. 855), authorized any Indian Agent, Superintendent, etc., to deposit Indian money, individual or tribal, coming into his hands as custodian, in such private banks as he might select, subject to the requirement that such banks execute a bond in the form approved by the Secretary of the Interior, to safeguard such funds.

The act of May 25, 1918 (40 Stat. 561), authorized the Secretary of the Interior to withdraw from the Treasury tribal funds susceptible of segregation, so as to credit an equal share to each member of the tribe and to deposit the funds in private banks, subject to withdrawal for payment to the individual owners, or expenditure for their benefit.

Prior to the act of February 12, 1929 (45 Stat. 1164), as amended by the act of June 13, 1930 (46 Stat. 584), tribal funds deposited in the Treasury of the United States to the credit of such Indians did not bear interest. Following the passage of that Act, tribal Indian funds on deposit in the Treasury of the United States to the credit of the respective Indian tribes bore simple interest at the rate of 4%.

The act of July 1, 1898 (30 Stat. 595), required United States Indian Agents to account for all funds coming into their hands, as custodians, from any source, and to be responsible therefor under their official bonds.

23. All the proceeds on account of purchase of timber on the Middle Mount Scott Unit, Klamath Indian Reservation, paid by the plaintiff to the Superintendent of the Klamath Indian School for the timber cut by it under the tribal timber contract of July 28, 1917, and the several allotment contracts made with individual Indian owners, as authorized by Article 2 of that contract, less the sum of 8% thereof, were deposited by the Superintendent, either in private state banks or in the Treasury of the United States, to the credit of the tribal, or individual, Indians concerned.

The tribal timber contract of July 28, 1917, and the several contracts made by the plaintiff with the holders of allotments, were administered as one contract, and all the proceeds arising under such contracts were paid to the Superintendent. The proceeds from the tribal contract were deposited in the Treasury under an account designated "Indian Moneys, Proceeds of Labor, Klamath Indians." No part of the beneficial income from the sale of timber on Indian reservations accrued to the benefit of the United States. All the net proceeds of the sale of such timber was deposited by the Superintendent to the credit of the respective tribal, or individual, Indians concerned.

The sum of 8% was deducted from the proceeds paid by the purchaser to the Superintendent for the timber, in accordance with Paragraph 21 of the amended Regulations, approved March 17, 1917, and the provisions of Section 1 of the act of February 14, 1920 (41 Stat. 415), which authorized the Secretary of the Interior, under such regulations as he might prescribe, to charge a reasonable fee for

the work incidental to the sale of timber, or in the administration of Indian forests, to be paid from the proceeds of sales of such timber. This 8% was deducted by the Superintendent from the gross proceeds and held by him in a separate account, which account was used to defray the expenses of administering the contracts of sale and the Indian forests. It was deposited in the Treasury to the credit of the United States, under the caption "Miscellaneous Receipts."

With respect to the method of accounting for the proceeds of sales of timber under the contracts, the practice followed by the Office of Indian Affairs was for the purchaser to pay to the Superintendent the advance payments, as stipulated in Article 4 of the contract.

Upon receipt of the proceeds from the purchaser the Superintendent of the Klamath Reservation made a credit upon the books kept in his office at the Klamath Agency in Oregon, showing the amount of money payable to the Klamath Indians and also the
62 respective sums of money payable to the individual Indian allottees concerned. This action was based upon scale reports made by Civil Service employees of the United States attached to the Klamath Indian Agency. The money belonging to individual Indian allottees was deposited in private banks, in a lump sum, to the credit of the Superintendent or Disbursing Officer of the Indian Agency who held such moneys in trust for the respective Indian allottees. The banks selected as depositaries for individual Indian moneys keep no record of the individual Indian accounts; that is, trust funds were subject to withdrawal by the Superintendent of the reservation and were distributed by him to the individual owners thereof under regulations prescribed by the Commissioner of Indian Affairs, and approved by the Secretary of the Interior. In cases involving large sums of money the matter was submitted to the Commissioner of Indian Affairs for authorization to distribute such moneys.

24. Early legislation vested unlimited discretion in the Secretary of the Interior with respect to the expenditure of moneys credited to the tribal Indians. Section 27 of the act of May 18, 1916 (39 Stat. 123, 159), restricted this discretion, subject to the following proviso:

"* * * that hereafter no money shall be expended from Indian Tribal funds without specific appropriation by Congress, except as follows: equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments, all of which are continued in full force and effect."

During the period from 1922 to 1934, both inclusive, per capita payments in excess of \$6,200,000 had been made direct to the Klamath Indians, on account of the proceeds paid under tribal contracts for the sale of timber on that reservation. Competent Indians were paid their shares of the per capita payments directly. The per capita shares of other Indians were deposited in their accounts and expenditure thereof was subject to departmental regulations.

The proceeds of sale from Klamath Indian timber have always been treated by the administrative department concerned as

63 moneys belonging to the Klamath Indians, either tribal or individual, and not as public funds belonging to the United States.

Prior to 1927, it was the practice for the Superintendent of the Klamath Indian Reservation to submit an account of all the Indian moneys in his possession to the office of the Bureau of Indian Affairs, and it was not then the practice of the General Accounting Office to review such reports. However, subsequent to 1927, the General Accounting Office has reviewed the accounts of Superintendents concerning Indian moneys in their possessions.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover \$25,094.56.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-five thousand ninety-four dollars and fifty-six cents (\$25,094.56).

Opinion

WILLEAMS, Judge, delivered the opinion of the court:

The plaintiff seeks in this suit to recover the sum of \$25,094.56, alleged to have been illegally collected from plaintiff as a part of the purchase price of certain Indian timber sold to plaintiff by the defendant. The controversy arises out of an increase in the price of yellow and sugar pine made by the Commissioner of Indian Affairs for the period beginning April 1, 1928, and ending March 31, 1931.

The facts disclosed are in all essential respects similar to the facts in the case of the Forest Lumber Company, No. L-391, this day decided. The questions of law presented are precisely the same. Our decision in the Forest Lumber Company case therefore controls the decision in this case and an extended opinion would be but a reiteration of what has already been said in that case, and is not deemed necessary.

64 Therefore, on the authority of the Forest Lumber Company case, the plaintiff is entitled to recover and is hereby awarded judgment in the sum of \$25,094.56. It is so ordered.

WHALEY, Judge; LITTLETON, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

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V. Judgment

At a Court of Claims held at the City of Washington on the 12th day of January, A. D., 1938, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-five thousand ninety-four dollars and fifty-six cents (\$25,094.56).

VI. *Proceedings after entry of judgment*

On March 10, 1938, the defendant filed a motion for extension of time to April 13, 1938, within which to file a motion for a new trial.

On March 12, 1938, said motion was allowed by the court.

On April 13, 1938, the defendant filed its motion for a new trial.

On May 2, 1938, the court entered the following order on said motion:

ORDER

It is ordered this 2d day of May 1938, that the defendant's motion for new trial be and the same is overruled.

66 [Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.